

IN THE UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
EL DORADO DIVISION

CALVIN D. STANLEY

PLAINTIFF

v.

Civil No. 1:07-cv-01061

JUDGE GEORGE VAN HOOK, JR.;  
ATTORNEY GARY McDONALD

DEFENDANTS

**MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION**

Calvin D. Stanley, formerly an inmate at the Union County Jail, El Dorado, Arkansas, brings this pro se civil rights action pursuant to 42 U.S.C. § 1983. Stanley's complaint was provisionally filed subject to a later determination of whether service of process should issue.

**I. Background**

According to the allegations of the complaint, in October of 2006 Stanley had a pending driving while intoxicated (DWI) charge. Stanley appeared before Defendant Judge George Van Hook, Jr., and was apparently found guilty. Stanley indicates his attorney, Defendant Gary McDonald, told Judge Van Hook he wanted to appeal the case. Stanley states he was told to start paying on the fine. In February of 2007, Stanley alleges he and his attorney appeared before a "higher judge" and was "charged again on the same case a second time."

Stanley requests that his money be refunded to him and that he be compensated for his lost of income from the time he was incarcerated. He also seeks damages for the "embarrassment of me in front of people making me look real silly as always he does me any kind of way when I got before him like discriminate against me."

**II. Discussion**

The claims asserted by Stanley in this case are subject to dismissal. First, Judge Van Hook is

immune from suit. *See Mireles v. Waco*, 502 U.S. 9, 11, 112 S. Ct. 286, 116 L. Ed. 2d 9 (1991)("Judicial immunity is an immunity from suit, not just from ultimate assessment of damages."). *See also Duty v. City of Springdale*, 42 F.3d 460, 462 (8th Cir. 1994). "Judges performing judicial functions enjoy absolute immunity from § 1983 liability." *Robinson v. Freeze*, 15 F.3d 107, 108 (8th Cir. 1994). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority." *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978).

Judicial immunity is overcome in two situations: (1) if the challenged act is nonjudicial; and (2) if the action, although judicial in nature, was taken in the complete absence of all jurisdiction. *See Mireles*, 502 U.S. at 11. It is clear from the allegations of the complaint that neither situation applies here.

In the past, claims for declaratory and injunctive relief "have been permitted under 42 U.S.C. § 1983 against judges acting in their official capacity." *Nollet v. Justices of Trial Court of Com. of Mass.*, 83 F. Supp. 2d 204, 210 (D. Mass. 2000), *aff'd without op.*, 248 F.3d 1127 (1st Cir. 2000)(citing *Pulliam v. Allen*, 466 U.S. 522, 104 S. Ct. 1970, 80 L. Ed. 2d 565 (1984)). "However, in 1996 Congress passed the Federal Courts Improvement Act ("FCIA"), Pub. L. No. 104-317, Title III § 309(c), 110 Stat. 3847, 3853, which legislatively reversed *Pulliam* in several important respects." *Nollet*, 85 F. Supp. 2d at 210. As amended by the FCIA, § 1983 now precludes injunctive relief against a judicial officer "for an act or omission taken in such officer's judicial capacity . . . unless a declaratory decree was violated or declaratory relief was unavailable." 42 U.S.C. § 1983.

Stanley does not allege that either of these prerequisites for injunctive relief are met. *See e.g.*, *Montero v. Travis*, 171 F.3d 757, 761 (2d Cir. 1999)(holding injunctive relief against a quasi-judicial

official is barred if the plaintiff fails to allege a violation of a declaratory decree or the unavailability of declaratory relief); *Fox v. Lee*, 99 F. Supp. 2d 573, 575-576 (E.D. Pa. 2000)(claim for injunctive relief dismissed where plaintiff's complaint fails to allege that either of the prerequisites to injunctive relief were met); *Ackermann v. Doyle*, 43 F. Supp. 2d 265, 273 (E.D. N.Y. 1999)(dismissing action against judicial officers because plaintiff failed to allege that a declaratory decree was violated or the declaratory relief was unavailable). Thus, to the extent Stanley seeks declaratory or injunctive relief his claims are subject to dismissal.

Furthermore, to be entitled to equitable relief, "plaintiff must show that he has an inadequate remedy at law and a serious risk of irreparable harm." *Mullis v. U.S. Bankruptcy Court for Dist. of Nevada*, 828 F.2d 1385, 1392 (9th Cir. 1987)(citations omitted). Equitable relief is not appropriate where an adequate remedy under state law exists. *See Pulliam*, 466 U.S. at 542 & n. 22, 104 S. Ct. at 1981 & n. 22. *See also Sterling v. Calvin*, 874 F.2d 571, 572 (8th Cir. 1989). An adequate remedy at law exists when the acts of the judicial officer can be reviewed on appeal or by extraordinary writ. *See Mullis*, 828 F.2d at 1392 (citation omitted). *See also J&M Mobile Homes, Inc. v. Hampton*, 347 Ark. 126, 60 S.W.3d 481 (2001)(discussing when a writ of prohibition is appropriate). Stanley has not shown or even alleged that he has an inadequate remedy at law for the alleged harms.

Second, Stanley's claims against Defendant McDonald are subject to dismissal. "[I]n any § 1983 action the initial inquiry must focus on whether the two essential elements to a § 1983 action are present: (1) whether the conduct complained of was committed by a person acting under color of state law; and (2) whether this conduct deprived a person of rights, privileges or immunities secured by the Constitution or laws of the United States." *Parratt v. Taylor*, 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981).

Private attorneys do not act under color of law and are not subject to suit under § 1983. *See DuBose v. Kelly*, 187 F.3d 999 (8th Cir. 1999). *See also, Polk County v. Dodson*, 454 U.S. 312, 318, 102 S. Ct. 445, 70 L. Ed. 2d 509 (1981) (public defender does not act under color of state law when performing traditional functions as counsel); *DuBose*, 187 F.3d at 1002-1003 (“[C]onduct of counsel generally does not constitute action under color of law.”); *Dunn v. Hackworth*, 628 F.2d 1111, 1112 (8th Cir. 1980)(“The actions of privately retained counsel are not considered state action and therefore cannot form the basis of a § 1983 claim.”). In this case Stanley alleges Defendant McDonald was his private counsel in a state prosecution for DWI. Defendant McDonald is therefore not subject to liability pursuant to § 1983.

### **III. Conclusion**

Accordingly, I recommend that this case be dismissed on the grounds that the claims are frivolous, fail to state claims on which relief can be granted, and seek relief against defendants who are immune from suit. *See* 28 U.S.C. § 1915(e)(2)(B)(i)-(iii)(IFP action may be dismissed on such grounds at any time).

**Stanley has ten (10) days from receipt of this report and recommendation in which to file written objections pursuant to 28 U.S.C. § 636(b)(1). The failure to file timely objections may result in waiver of the right to appeal questions of fact. Stanley is reminded that objections must be both timely and specific to trigger de novo review by the district court.**

Dated this 6th day of September 2007.

/s/ Barry A. Bryant

BARRY A. BRYANT

UNITED STATES MAGISTRATE JUDGE